

# COVINGTON & BURLING LLP

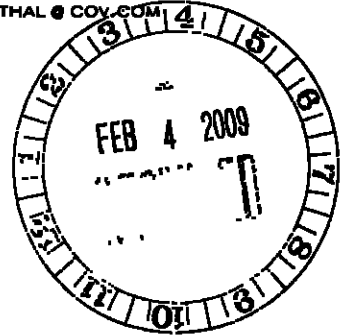
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February 4, 2009

224472



## BY HAND

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Re *Ex Parte No 681 -- Class I Railroad Accounting and Financial  
Reporting -- Transportation of Hazardous Materials*

Dear Secretary Quinlan

Enclosed for filing in the above-referenced docket, please find the original  
and ten copies of the Comments of Union Pacific Railroad Company

An additional copy of this filing is enclosed. Please return a date-stamped  
copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal".

Michael L. Rosenthal

Enclosure

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Office of Proceedings

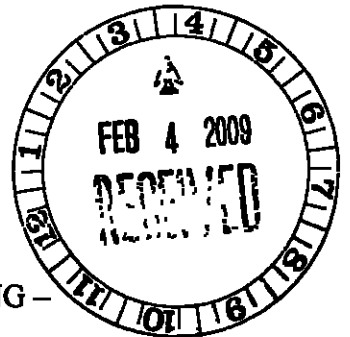
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

224472

STB Ex Parte No 681



CLASS I RAILROAD ACCOUNTING AND FINANCIAL REPORTING -  
TRANSPORTATION OF HAZARDOUS MATERIALS

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No 681

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CLASS I RAILROAD ACCOUNTING AND FINANCIAL REPORTING –  
TRANSPORTATION OF HAZARDOUS MATERIALS

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COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company (“Union Pacific”) respectfully submits the following comments in response to the Surface Transportation Board’s Advance Notice of Proposed Rulemaking, served January 5, 2009 (“ANPR”). In the ANPR, the Board sought public comments on whether and how it should update its accounting and financial reporting for Class I rail carriers and refine its Uniform Railroad Costing System (“URCS”) to better capture the operating cost of transporting hazardous materials. Union Pacific believes that the Board should improve its informational tools to better identify and attribute the costs of hazardous-materials transportation movements, and we welcome the opportunity to assist in this endeavor. Union Pacific endorses the Comments of the Association of American Railroads, which should be read first as background. We offer these comments to provide additional perspective on the issues raised by the ANPR.

I     INTRODUCTION

As one of the world’s largest transporters of hazardous materials by rail, Union Pacific plays an important role and undertakes significant responsibilities as a participant in the hazardous-materials supply chain. The safe and efficient handling of hazardous materials throughout the supply chain is one of our highest priorities, but so also is fairly apportioning and balancing the burdens of risk and liability across the participants in the supply chain. Indeed,

Union Pacific believes that all participants in the hazardous-materials supply chain must bear responsibility for the risk and liability associated with transporting these materials in order to achieve the highest level of safety. Forcing railroads to bear a disproportionate share of these burdens is contrary to the public interest in promoting safe and accident-free behavior.

The Board's proposal to better identify and attribute the costs of hazardous-materials transportation movements is a positive step, but it is only a first step. Identifying and attributing the costs of transporting hazardous materials is very different from fairly apportioning responsibility for the risk and liability associated with transporting hazardous materials. Union Pacific is not concerned merely with recovering its operating and capital costs associated with transporting hazardous materials. Union Pacific is concerned with the real, generally unavoidable, and possibly staggering economic consequences that are associated with our common carrier obligation to transport hazardous materials. The burdens of risk and liability exposure that railroads face when they transport hazardous materials cannot be alleviated or more fairly apportioned merely by refining URCS.

Union Pacific regards the transportation of hazardous materials as its most significant enterprise risk. A hazardous-materials incident in the wrong place under the worst conditions could have a devastating financial impact on Union Pacific, to say nothing of its effects on the public. The ANPR does not address the need to ensure that the burdens of risk and liability associated with transporting hazardous materials are borne by all the participants in the supply chain so that they all have appropriate incentives to reduce the overall level of exposure to risk and liability. Union Pacific urges the Board not to lose sight of this broader issue facing the nation's railroads as it pursues the worthy objectives described in the ANPR.

## II THE COSTS OF TRANSPORTING HAZARDOUS MATERIALS

Union Pacific commends the Board for its proposal to better identify and attribute the costs of hazardous-material transportation movements. Producers and consumers of hazardous materials will lack the appropriate incentives to minimize the use of surface transportation, and thus to reduce the risks of transporting these highly dangerous materials, unless they bear the actual costs of their distribution decisions. Unfortunately, the Board's rules governing rate cases contribute to the problem. Railroads expend considerable resources to handle hazardous materials safely, but they are not allowed to attribute those costs to hazardous-materials movements under the current rules governing rate cases. As a result, those costs must be borne by the railroad or by other shippers. That result is unfair and contrary to sound public policy. The Board's proposal thus represents a step in the right direction.

### A Union Pacific's Commitment To Safe Handling Of Hazardous Materials

Union Pacific has always been active in providing for the safe handling of hazardous materials. Because Union Pacific regards hazardous-materials transportation as our most significant enterprise risk, we have taken extraordinary precautions to enhance safety, and we continue to develop and institute new operating procedures and invest additional capital dollars to minimize the risks to our company, our employees, and the communities in which we operate.

Union Pacific has a well-established history of continuously refining and improving its safety practices. Consistent with that history, and in response to recent government initiatives to improve the security and safety of the nation's transportation infrastructure, we have taken important steps over the last several years to ensure that all hazardous materials are handled on our network as safely, securely, and efficiently as possible. We proactively implemented new operational safety and security processes and practices to put ourselves in full compliance with the government's new transportation safety regulations. Several examples of the many safety

improvement initiatives that we have recently completed or currently have in progress with respect to Rail Security Sensitive Materials ("RSSMs"), which include toxic inhalation hazard ("TIH") materials, are

- Strict adherence to a "no bill/no pull" policy, under which cars containing hazardous materials are not pulled from a customer facility unless proper billing and shipping documentation is in our internal systems
- Substantial increases in the amount of time that loaded cars are under observation
- Daily monitoring of movements for excess transit time, with appropriate corrective action
- Installation of a Customer Inventory Management System to manage inventory levels and avoid cars standing in our terminals for prolonged periods of time
- Establishing protocols for positive hand-offs at affected points of interchange with shippers, receivers, and other carriers

In 2005, to further heighten our internal awareness of, and attention to, the safest possible handling of hazardous materials, Union Pacific implemented a TIH Transportation and Compliance Program. Led by a Vice President, this initiative's purpose is to recognize and manage the inherent risks associated with TIH to achieve and maintain safe, reliable, and efficient operations. Union Pacific has implemented scores of new procedures under this initiative. Currently, TIH management process modifications have been completed, or are underway, for

- consist accuracy improvements,
- hazardous material and emergency response plan revisions,
- dwell time reduction and process improvement,
- chemical facility inspections and security audits,
- chemical facility track and derail inspection procedures,
- positive hand-off testing, development, and deployment

Union Pacific has also participated for years in refining and developing safety procedures with federal, state, and local law enforcement agencies, as well as the chemical industry, and has been recognized repeatedly as a model for transportation safety analysis and improvement. We have been rail industry leaders in both the Chemical Industries Responsible Care Initiative and the TRANSCAER program, which reaches out to the communities first responders with education and training programs.

**B      The Costs Associated With Safe Handling Of Hazardous Materials**

Union Pacific incurs significant costs associated with its efforts to handle hazardous materials in the safest possible manner, and these costs continue to escalate. As discussed above, we have made a consistent effort to initiate safety improvements and will continue to do so. Union Pacific also expects that government security requirements will continue to evolve, and we will have to modify our operations and incur additional costs to comply with the new requirements.

Union Pacific spends substantial operating and capital dollars on activities that exclusively support hazardous material transportation. Operating costs that we would not incur were it not for hazardous material transportation include, among other things, costs of complying with special safety and security procedures (e.g., "no bill/no pull", positive hand-off, shipment monitoring and tracking rules), costs associated with special handling procedures (e.g., extra car and track inspections, speed restrictions, switching and blocking requirements, and buffer car costs), costs of training railroad personnel and public safety employees in the communities we serve about special operating and safety procedures, and costs of maintaining insurance to cover the heightened risk of loss associated with hazardous material transportation. Capital costs that we would not incur were it not for hazardous material transportation include, among other things, costs of installing security measures at yard facilities, costs of installing special locomotive

safety equipment and car failure detection technology, and the costs of installing premium materials, increasing maintenance, and modernizing signal technology on routes that carry significant volumes of hazardous materials

As discussed in the next Part, Union Pacific recognizes, and urges the Board to recognize, the significant limitations on the Board's ability to identify and attribute all the costs associated with hazardous material transportation within the framework provided by URCS. However, the Board's proposal represents a meaningful step toward addressing this important issue, and we intend to work with the agency as it pursues the objectives described in the ANPR.

### III THE NEED FOR FLEXIBILITY GIVEN THE LIMITATIONS OF URCS

The ANPR is an important step towards acknowledging that moving hazardous materials by rail involves costs that exceed the costs that would be attributed to such movements using the present version of URCS. However, Union Pacific urges the Board to be open to alternative methods of accounting for these costs and addressing the larger problem of apportioning the burdens of risk and liability associated with transporting these materials as it works to refine URCS. The Board's willingness to consider alternatives is important for three principle reasons. First, a rulemaking will not produce a usable version of URCS for several years. Second, even a refined version of URCS will likely require case-by-case adjustments to capture accurately the costs of transporting hazardous materials. Finally, even a refined URCS cannot address the possibly staggering economic consequences that railroads face because of their common carrier duties to transport hazardous materials.

#### A Producing a Usable Version Of A Refined URCS Will Take Time

As the Board appears to recognize, there will be significant challenges in producing a refined version of URCS. As a general matter, the Board must identify the costs associated with transporting hazardous materials, determine how to measure those costs, and decide how to



allocate those costs to specific movements of hazardous materials – but that description is deceptively simple. Certain costs will be identifiable, quantifiable, and attributable solely to hazardous material transportation – for example, costs of safety training and investing in new security equipment mandated by law. Other costs may require special studies to quantify – for example, costs of special switching and blocking requirements, administrative costs associated with car monitoring and tracking rules, and higher insurance premiums. In addition, as the Association of American Railroads explains in its Comments, properly attributing certain costs to hazardous material transportation, including, in particular, costs associated with capital expenditures necessary to implement federally mandated safety rules, presents conceptual challenges given the historical nature of URCS. The process will not be as simple as identifying the appropriate costs and operating statistics and then plugging them into URCS.

Moreover, even after the rulemaking process is complete, it may be several years before the Board can produce the first version of a refined URCS. As the Association of American Railroads discusses in its comments, URCS requires analysis of data collected over time for many of its allocations. Thus, railroads will likely have to collect data for several years after new rules are adopted before the new costs actually can be used in Board proceedings.

The special costs of transporting hazardous materials are significant, and the public interest in allocating those costs to the producers and consumers of those materials is compelling. The Board should therefore encourage parties to propose alternative methods of accounting for the costs of transporting hazardous materials on a case-by-case basis, at least until it produces a refined version of URCS.

#### **B     Refining URCS May Not Eliminate The Need For Case-By-Case Adjustments**

Union Pacific believes that the Board's current approach of using system-average costs significantly and systematically understates the true costs of transporting hazardous materials,

and thus we strongly support efforts to refine URCS. At the same time, we are not confident that any URCS-based approach will ever provide a completely satisfactory attribution of costs to movements of hazardous materials. The Board should make a concerted effort to refine URCS, but it also should leave open the possibility of case-by-case adjustments to account for factors that cannot be addressed by a refined URCS.

Union Pacific's concern about relying strictly on a refined URCS is based on our experience with URCS and with the issues involved in transporting hazardous materials. Although we believe that a refined URCS would be able to account for enough of the costs associated with transporting hazardous materials to justify the effort to refine URCS, we are uncertain whether all of those costs, including some of the most significant ones – such as capital investment – will fit within the framework of URCS. In addition, although we expect that efforts will be made to develop processes that are flexible enough to account for a wide variety of costs, we are concerned that railroads will face new types of costs – particularly as a result of regulatory efforts in this evolving area – and that these new types of costs will not be reflected, or will not be reflected quickly enough, even in a refined URCS.

Finally, URCS costing based on system-average movements of hazardous materials will better reflect the costs of transporting hazardous materials than costing based on averages of all movements, but there will still be important movement-specific differences in costs. Hazardous materials are not all alike – some (like the RSSMs subject to the Transportation Security Administration's recently finalized regulatory requirements – *i.e.*, THH and certain explosive and radioactive materials) require even higher levels of care in switching or even higher security precautions. Nor are all shipments of the same material alike – a shipment that is transferred within a High Threat Urban Area ("HTUA") will be more costly than a shipment that does not

move through an HUTA. These differences might be easier to reflect as adjustments to URCS, rather than incorporated directly into a refined URCS.

#### **C     Refining URCS Will Not Address Rail Carriers' Exposure To Risk And Liability**

Union Pacific believes that refining URCS is an important step in ensuring that producers and consumers of hazardous materials bear the costs of their transportation decisions, but better identifying and attributing the operating and capital costs of transporting hazardous materials does not address the larger issue of fairly apportioning and balancing the burdens of risk and liability across the participants in the hazardous-materials supply chain. Rail carriers are exposed to potentially devastating liability when we transport hazardous materials, and this problem cannot be addressed merely by refining URCS. A regulatory costing approach based on identifying and allocating only past, observable costs will not allow us to assign a fair share of the risk to producers and consumers of hazardous materials, and thus does not provide all participants in the hazardous-materials supply chain with the appropriate incentives to achieve the highest level of safety. The Board should be open-minded as rail carriers develop methods of promoting safe behavior that go beyond simple efforts to recover costs under regulatory costing principles.

#### **IV     CONCLUSION**

Union Pacific appreciates the opportunity to participate in this proceeding. We support the Board's effort to better identify and attribute the costs of hazardous-material transportation movements by refining URCS.

At the same time, the Board should recognize that the ANPR does not address the critical issue of how to fairly apportion the burdens of risk and liability associated with transporting hazardous materials. Currently, railroads bear a disproportionate share of these burdens. This situation is neither fair to railroads nor consistent with the public interest. We therefore urge the

Board to act on the AAR's request in Ex Parte No 677 (Sub-No 1) to clarify that railroads may impose reasonable liability sharing requirements as a condition of carrying certain hazardous materials. We also urge the Board to remain open-minded as railroads experiment with other ways to promote safe behavior, and discourage unnecessarily risky behavior, by producers and consumers as they make decisions involving the transportation of hazardous materials.

Respectfully submitted,



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